U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 27Apr2001

Case No.: 1999-STA-12

In the Matter of:

ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH,
Prosecuting Party,

and

KERRY FILER,
Complainant,

against

ARCH ALUMINUM & GLASS, INC.,
Respondent

APPEARANCES:

JAMES M. ALLEN, ESQ.,
On behalf of the Complainant

HAAS A. HATIC,
On behalf of the Respondent

BEFORE: RICHARD D. MILLS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This cause came before the Court on April 14 and 15, 1999 pursuant to Respondent's objections to the Secretary's findings and request for a hearing. Said objection was timely filed with the Court on November 20, 1998.

The Secretary of Labor through his agents issued findings in this case on October 20, 1998. The case before us is an appeal from the Secretary's findings pursuant to the Surface Transportation Assistance Act (hereafter, "the STAA", or "the Act"). Specifically, this Court has jurisdiction over this case based

on 49 U.S.C. §31105(b)(2)(B) of the Act. Respondent, Arch Aluminum & Glass, Inc. timely filed its objections and request for hearing on November 20, 1998.

After receiving the evidence, reviewing the case file, considering the briefs filed by the parties, and being otherwise advised on the premises, the Court enters judgment in favor of Complainant.

I. Preliminary Motions

Prior to hearing, Respondent, Arch Aluminum & Glass, Inc. (hereafter, "Arch"), filed three motions with the Court. First, Arch moved the Court to strike certain of Complainant's pleadings and to dismiss the case because those pleadings were not timely filed with the Court. Second, Arch moved the Court to Vacate its earlier Order Granting Motion to Quash and Motion for Protective Order. Third, Arch offered a Reply in Further Support of the Motion to Vacate the Order Granting the Motion to Quash.

The Court denied each of these motions. We denied the first motion because we were satisfied that the Complainant had compelling reasons for the late filing of his pre-hearing statement. Some of those compelling reasons, the Court believes to be the fault of the Respondent. We denied the second and third motions because as a matter of law this Court does not have subpoena power with respect to cases under the STAA. Respondent in its post-trial brief requests that we reconsider our rulings now. *Respondent's Brief* at 2. The Court can find no compelling reason to overturn our prior decisions with respect to these motions. Accordingly, Respondent's request for reconsideration is denied.

II. Issues for Consideration

Employer timely objected to the preliminary findings of the Assistant Secretary and sought review of those findings by this Court.[1] Employer lists nine issues for resolution by this Court.

> 1) Whether Employer was denied due process and equal protection where the Assistant Secretary's Investigator refused to advise the Employer in writing of the allegations of the Complaint;
>
> 2) Whether the Employer was denied due process or equal protection where the Assistant Secretary or OSHA failed to advise Employer of the evidence supporting the complaint

[1]The Court notes that Respondent's Counsel bases many of his preliminary arguments on the assertion that the complaint is a moving target. Specifically, counsel asserts that the complaint as outlined at the beginning of the hearing is not the same as the complaint asserted before the Assistant Secretary. (TX, p. 28). In the Court's view, because Employer objected to the findings of the Secretary, it is properly Employer's role to define the issues for consideration here. The Court is satisfied that the purpose for which Complainant sought redress below is the same as the purpose for which he seeks redress here.

prior to the issuance of the Assistant Secretary's preliminary findings;

3) Whether the Assistant Secretary's investigator engaged in prosecutorial misconduct during the initial investigation of the complaint;

4) Whether Complainant states a *prima facie* case under 49 U.S.C. § 31105;

5) Whether Employer has proven a legitimate, non-discriminatory reason for discharging the Complainant;

6) Whether Complainant's safety allegations are time-barred;

7) Whether Complainant's claims are outside the scope of the charge;

8) Whether Complainant's failure to exercise reasonable diligence in seeking alternative employment bars back pay and other benefits;

9) Whether Complainant's unclean hands constitute an estoppel or waiver or the claims are barred by either issue or claim preclusion.

III. Stipulations

The parties stipulate to the following facts[2]:

1) This action is brought pursuant to 49 U.S.C. §31105 which is the whistleblower protection provision of the Surface Transportation Assistance Act of 1982;

2) Complainant was a driver of commercial vehicles with a gross vehicle weight in excess of 10,0001 pounds as defined by 49 U.S.C. §31101(2);

3) Respondent company is engaged in interstate trucking operations and is a commercial motor carrier subject to the Surface Transportation Assistance Act;

4) At all relevant times herein Respondent was an Employer as defined by 49 U.S.C. §31101(3);

5) On October 20, 1998 the Secretary of Labor found that Respondent had violated

[2](TX, p. 24-26).

Section 31105 of the STAA when it changed Filer's work assignment and subsequently discharged him. The Secretary therefore ordered Respondent to reinstate the Complainant and reimburse him for back pay;

6) The Respondent timely objected to the Secretary's findings;

7) Complainant began working for Arch in February, 1996 and shortly thereafter became a truck driver;

8) Prior to June, 1998, Filer was assigned a route transporting glass from Memphis to various customers in and around New Orleans, Louisiana known as the Gulfport run;

9) Filer received a disciplinary notice on June 8, 1996 and was advised that he would be placed on probation for his next infraction;

10) OSHA/Department of Labor gave Respondent notice of Complainant's complaint on or about July 7, 1998;

11) Complainant's employment was terminated on or about August 24, 1998.

IV. Findings of Fact

1. Complainant, Kerry Filer, worked for Employer, Arch Aluminum and Glass, Inc. from 1996 until 1998. (TX, p. 25).

2. During the time that Complainant was employed by the employer, he worked primarily as a truck driver. (TX, p. 25).

3. During the course of his employment Complainant was assigned to the Gulfport run. (TX, p. 26).

4. During his employment with Arch, Mr. Filer repeatedly voice safety concerns to higher management about the trucks that he was required to drive. (TX, p. 87). Members of the company's office staff were aware of the complaints about the safety of the trucks. (TX, p. 248). Complainant also specifically complained to the company dispatcher in Memphis, Mr. Fletcher. (TX, p. 305). Mr. Perry, who was the supervisor of the workers who loaded Complainant's truck indicated that he had also been told about the safety problems by the Complainant. He testified that Complainant had told several of the loaders about the safety problems as well. (TX, p. 397-398). Complainant also testified that he made

a specific safety complaint to Jerome Ellis, the plant manager, in October of 1997. (TX, p. 90). Ellis admitted that he knew about the safety complaints and the company intended to have them repaired. (TX, p. 332).

5. As a part of his job, Mr. Fletcher was responsible for looking after the safety of the trucks. (TX, p. 291).

6. In May of 1998, Filer was told by another driver that Chris Morelock intended to take over the complainant's Gulfport run. (TX, p. 50).

7. Subsequently, Complainant discovered that Morelock was running the Gulfport route in violation of DOT regulations. Complainant reported this to the dispatcher and other company supervisors. (TX, p. 52). Suzanne Drewry, who was in charge of reimbursing drivers for their expenses testified that she suspected that Morelock was violating DOT regulations because he had not given her receipts for hotel rooms for some of his trips. (TX, p. 244-246). The DOT regulations specifically require an eight hour overnight stay on the Gulfport run because of the length of the trip. (TX, p. 51). Mr. Fletcher, the dispatcher at this time testified at the hearing that he knew that Morelock was running the route in violation of DOT regulations. (TX, p. 308). Complainant also wrote a letter to Mr. Silverstein, the president of Arch, on June 27, 1998 informing him of Mr. Morelock's violation. (CX-8; TX, p.80).

8. In August of 1998, Complainant wrote to Captain Williams of the Tennessee Department of Public Safety informing him of various DOT violations committed by Arch's drivers and specifically of the violations committed by Chris Morelock. (TX, p. 219; RX-2). Previously, Complainant had reported the same violations to the U.S. Department of Labor Occupational Safety and Health Administration. In that complaint he had also included the previous allegations about the safety of Arch's trucks. His statement for this complaint was taken August 12, 1998. (RX-1). The OSHA investigation was actually commenced on July 7, 1998.

9. The evidence introduced at trial shows that Morelock was disciplined for violation of the applicable DOT regulations. (CX-18, CX-19).

10. In June of 1998 the Complainant was taken off of the Gulfport run after he reported that Morelock was violating DOT policy. (TX, p. 64).

11. Complainant received a written reprimand from his supervisor on June 18, 1998 for falsifying a piece count sheet. The parties stipulate that he was not put on probation. (TX, p. 25, 150, 60; CX-8).

12. Mr. Ellis testified that the Complainant was taken off of the Gulfport run because he was failing to return in a timely fashion. This prevented Employer from having access to its trucks when it needed to load them for the next day's work. (TX, p. 329).

13. On at least one occasion, April 15, 1998, Complainant's records show that he himself drove the Gulfport run in violation of DOT standards.

14. According to Employer's records, Complainant received as many as 12 written disciplinary reports in the 30 months that he worked for the company.

15. On July 6, 1998, Complainant sent a letter to Jerome Ellis, the plant manager detailing the nature and allegations of his complaint. (TX, p. 155-56; CX-10). He specifically alleged that other drivers at the company were violating DOT regulations. (CX-10).

16. Complainant complained repeatedly about being removed from the Gulfport run. (TX, p. 70, p. 80).

17. On August 19, 1998, Complainant left a request to see his personnel file on the desk of the plant manager, Jerome Ellis. The request was left after hours when the Complainant had returned from his run and no one else was in the office at the time. (TX, p. 114-116).

18. Employer alleges that the Complainant stole documents from the office of Jerome Ellis on August 19, 1998. The Court finds, however, that the evidence does not tend to support this claim. In response to a proper discovery request, Employer refused to even identify what documents were allegedly taken from the office. Employer contended instead that the documents were proprietary and confidential company documents which it was not required to produce.[3] (TX, p. 270). Ellis contends that the documents on his desk were write ups and time cards pertaining to Chris Morelock's operation on the Gulfport run. (TX, p. 334). Ellis testified that he did not know on what specific date the documents went missing from his desk. (TX, p. 344-345). Ellis also admitted that he told the state unemployment office in a written document that Filer had stolen the documents on August 13. He specifically stated that among the documents stolen was Filer's personnel file. (TX, p. 360-361). Ellis acknowledged both that Filer's personnel file was never stolen and that the date on the report to the state unemployment office was incorrect. (TX, p. 360-361; CX-23). The document that Ellis sent to the state unemployment office

[3]The Court notes that the Employer was not asked to produce, but rather to simply list the documents it alleges were stolen in this incident. They flatly and perhaps improperly, refused this request.

contesting Complainant's claim for unemployment compensation was dated August 20, 1998. (TX, p. 363; CX-23). Ellis admits, however, that the note he received requesting to see Complainant's personnel file was not received until the 19th or the 20th of August and that this note supposedly was found in the place of the stolen documents. (TX, p. 363). The Court infers from the Employer's discovery responses that Employer had some reason not to reveal the documents it alleges were stolen. The Court also finds that the evidence regarding when the documents were taken, where they were taken from, and what was taken is contradictory. Further, the Court finds that the errors in Mr. Ellis' statements to other government agencies and the discrepancy as to the dates makes his testimony unreliable. Considering the weight of all of the evidence, the Court finds that there is insufficient proof to support the conclusion that Complainant stole documents from the company.

19. On July 10, 1998 during a conversation with Mr. Ellis, Mr. Fletcher, and Mr. McDonald, the Complainant told them that he had filed a complaint with OSHA. (TX, p. 98).

20. During the same meeting on July 10, 1998, Mr. Ellis told the Complainant that if he pursued the complaint any further he would fire him.[4] (TX, p. 100). The Court notes that Mr. Ellis and Mr. Fletcher both testified at trial and neither denies that this statement was made to the Complainant.

21. The Complainant was terminated from Arch Aluminum and Glass on August 24, 1998. The reason given for his termination was that he had stolen unspecified confidential company documents. (TX, p. 117-119).

22. As a result of his removal from the Gulfport route, Complainant alleges that he lost hours while working for Employer. Specifically, Complainant testified that he lost about six hours per week at a rate of $11.00 per hour or $66.00. (TX, p. 124). Employer counters that Complainant lost hours only because he refused to work more than three days per week. Employer suggests that if Complainant had agreed to the change in schedule, which was common at the company, he would have lost no work time. (TX, p. 176). The Court finds that Complainant's refusal to accommodate a changed schedule, and not his removal from the Gulfport run caused his loss of earnings.

23. The Complainant sought alternate employment after his termination. He was unable to obtain such employment and was therefore forced to retrain himself in the insurance business. (TX, p. 121-123).

[4]The Court declines to repeat the more colorful language that Mr. Ellis allegedly used here.

24. Complainant's average weekly wage while at Arch was $482.50 per week. Complainant testified that he worked an average of 44 to 45 hours per week and that he earned $11.00 per hour. (TX, p. 124).

25. Complainant also lost as a result of his termination the medical insurance coverage offered by the Employer. Complainant testified that securing replacement coverage would have cost him $320.00 per month.

V. Discussion

Once a case has been fully tried on the merits, it is no longer necessary to determine whether the complainant has presented a *prima facie* case. *Ass't Sec'y &Ciotti v. Sysco Foods Co. of Philadelphia*, ARB No. 98-103, ALJ No. 97-STA-30 (ARB, July 8, 1998) (once employer presents evidence to show that the complainant was subjected to adverse action, such as termination, for a legitimate, nondiscriminatory reason, it no longer serves any purpose to answer the question whether the complainant presented a *prima facie* case). Instead, the relevant inquiry is whether the Complainant prevailed by a preponderance of the evidence in establishing that the reason for his termination was his protected safety complaint(s). *See Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999); *Ciotti*, supra; *Waldrep v. Performance Transport, Inc.*, 93-STA-23 (Sec'y Apr. 6, 1994).

Protected Activity

Under the Act, a complaint need not explicitly mention a commercial vehicle safety standard to be protected. The statute requires only that the complaint "relate" to a violation of a commercial motor vehicle safety standard. *Nix v. Nehi-RC Bottling Co., Inc.*, 84-STA-1 (Sec'y July 13, 1984). Internal complaints to management are protected under the whistleblower provision as long as the complainant proves that he actually made such and internal complaint by a preponderance of the evidence. *Williams v. CMS Transportation Services, Inc.*, 94-STA-5 (Sec'y Oct. 25, 1995).

The Court specifically finds that this Complainant, Kerry Filer, did engage in protected activity under 49 U.S.C. §31105. Complainant testified and Employer concedes that during his employment Mr. Filer repeatedly voiced safety concerns to higher management at the Memphis plant and at the company's home office about the trucks the company was using to deliver its product. (TX, p. 87). Members of the company's office staff in Memphis, the Memphis dispatcher, the loading supervisor, and the Memphis plant manager were all aware of the complaints that Mr. Filer had made. (TX, p. 248, 305, 397-398, 90, 332).

Complainant also reported to the Company that its employees was violating Department of Transportation regulations for the safe operation of its trucks. Complainant testified that he specifically told

the dispatcher and other company supervisors about these infractions with respect to Mr. Morelock. (TX, p. 52). Complainant also wrote a letter to this effect to Mr. Silverstein, the company's president, on June 27, 1998. (CX-8; TX, p. 80). Mr. Fletcher, the dispatcher in Memphis, testified that he knew that Mr. Morelock was operating in violation of DOT regulations. (TX, p. 308).

In August of 1998, Complainant also reported these violations to the Tennessee Department of Public Safety. He wrote a letter alleging the violations to Captain Williams of that organization and sought an investigation by the Tennessee Department of Public Safety. (TX, p. 219; RX-2). Complainant also complained to other government organizations, including OSHA in July of 1998. (RX-1).

The Court is satisfied that the Complainant has met his burden. The weight of the evidence, uncontradicted by the Employer is that the Complainant engaged in protected activity. He repeatedly complained about issues related to commercial motor vehicle safety standards including proper loading, and driver time records. The Court therefore finds that he engaged in protected activity.

Adverse Action

Once the Complainant establishes that he engaged in protected activity, he must then demonstrate by a preponderance of the evidence that Respondent took adverse action against him. Filer argues that two independent adverse actions were taken against him. First, Filer contends that his removal from the Gulfport run in June of 1998 was the result of his protected activity. Second, Filer maintains that his termination on August 24, 1998 was the ultimate result of his protected activity. The Court finds that both of these were in fact adverse actions.

Reason for Adverse Action was Complainant's Protected Activity

The final proof required of the Complainant is that the reason for the Respondent employer's adverse action was his protected safety complaint. *See Pike v. Public Storage Companies, Inc.*, ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999). Complainant's burden is to demonstrate that his protected activity was more than likely the motivation for employer's action or that employer's proffered explanation is incredible. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992).

1. Removal from the Gulfport run

Complainant claims that his removal from the Gulfport run in June of 1998 was the proximate result of his protected activity. He explains that he was taken off of that run, which he considered his run, at the same meeting where he reported that other drivers were running the Gulfport route illegally. (TX, p. 64). Complainant himself had previously performed this run in violation of DOT regulations. (RX-6; TX, p. 288-289). The purpose for the meeting at which Complainant was reassigned was to discipline him for falsifying the piece count sheet used on his most recent trip to Gulfport. On that sheet, Complainant had

correctly identified the time when he left Memphis, but had falsified the reason that he left late. (TX, p. 25, 60, 150; CX-8).

Mr. Ellis, the plant manager testified that the Complainant was removed from the Gulfport run in June of 1998 because he was routinely failing to return from that run in a timely fashion. Employer presented evidence that the available trucks allowed them to make the Gulfport run only twice per week and that this required the truck from the first run to return on time so it could be loaded for the second run. When Filer took extra time to complete the run, he was disturbing the company schedule. (TX, p. 329).

The Court finds that the Employer had legitimate reasons to remove the Complainant from the Gulfport run in June of 1998. Complainant does not deny that he routinely came to work late and that this resulted in his returning to the factory late on the following day. The Court finds that this would necessarily disrupt the company schedule and therefore its profit making capacity. The Court further finds that there is no evidence that this removal resulted directly from Filer's protected activity. Nothing indicates that he was specifically dropped from the Gulfport run as a reaction to his safety complaints. He was dropped because he could not perform the run fast enough. Thus it was legally acceptable to remove Filer from the Gulfport run in June of 1998.

The Court further finds that the Employer's emphasis on performing this route in a set amount of time pressured drivers to perform the route in violation of DOT regulations. Filer himself performed the route in violation of these regulations at least once. The evidence shows that Chris Morelock, another driver on the Gulfport route, was repeatedly disciplined for such infractions. (CX-18, CX-19). In the Court's opinion, these facts lend credibility to the numerous safety complaints registered by the Complainant.

2. Termination

Complainant also asserts that his termination on August 24, 1998 was the result of his protected activity. Employer offers the theft of company documents as its reason for Complainant's termination. The Court finds that there is no evidence to support the conclusion that the theft happened or that Mr. Filer stole the documents. The Court therefore finds that Employer's reason for terminating the Complainant's employment is pretextual and that Complainant is entitled to a remedy.

On June 27, 1998, Complainant wrote a letter detailing some of his many safety concerns to the president of Arch Aluminum and Glass, Mr. Silverstein. He specifically informed Mr. Silverstein that Arch drivers were operating the Gulfport run in violation of DOT regulations. (CX-8; TX, p. 80). On July 6, 1998, Complainant also sent a letter to Jerome Ellis, Arch's Memphis plant manager. This letter also detailed the nature of his complaint and indicated that company drivers were operating in violation of DOT regulations. (CX-10; TX, p. 155-156). Complainant filed a complaint with OSHA on July 7, 1998

making similar allegations. His statement relating to that complaint was taken by Ray Levitt on August 12, 1998. (RX-1).

Complainant met with Mr. Ellis, Mr. Fletcher, and Mr. McDonald, all representatives of the company, on July 10, 1998. During that meeting, Complainant was asked about his complaints in the letter to Mr. Ellis and the letter to Mr. Silverstein. He also informed the management of the company that he had filed a complaint with OSHA. (TX, p. 98). The Court finds that during this conversation, Mr. Ellis became extremely agitated and told the Complainant how he felt about the situation.

Specifically, the Court finds that Mr. Ellis told the Complainant that if he did not drop the OSHA complaint he would be fired. (TX, p. 100). Both Ellis and Fletcher testified at trial and neither denied that they were present for this meeting or that this statement was made.[5]

The Court finds that this evidence is enough, independently, to make Complainant's case that his termination was motivated by his protected activity. Apparently Mr. Ellis said as much a little more than one month prior to terminating Mr. Filer. Accordingly, the Court finds that Mr. Filer is entitled to an award.

Employer counters that it fired Mr. Filer because he stole proprietary and confidential documents from the company on August 19, 1998. Our findings of fact concluded that the evidence did not support the conclusion that Filer stole any documents. The Court renews that finding here. Employer refused to identify what documents were stolen in response to a proper discovery request. Then Employer alleges that the documents were records of another driver and improperly argues with Complainant about his need for those documents in the course of trial. Then to add insult to injury, Employer's plant manager filed an erroneous document detailing the circumstances of the theft with the Tennessee unemployment office in response to Complainant's request for unemployment compensation.

It is the sole province of the trial Court to determine the credibility of the witnesses and evidence presented. Given the discrepancies, mystery, and intentional deception present in the Employer's actions and specifically those of Mr. Ellis, the Court determines that on this issue the Employer is entirely without credibility. Counsel asserts the documents were taken on August 19. Ellis testifies he does not remember the date. (TX, p. 344-345). Yet Ellis filed a detailed statement with the Tennessee unemployment division, however, alleging that the documents were stolen on Wednesday night, August 13, 1998.[6] Ellis' statement

[5]The Court notes that about this time the Complainant discovered that Mr. Fletcher, the dispatcher, had been told to document everything relating to Mr. Filer. (TX, p. 106).

[6]The Court takes judicial notice of the fact that according to our 1998 calendar, August 13, 1998 was a Thursday, not a Wednesday.

is dated August 20, 1998. (CX-23). Then Ellis acknowledged at trial that one of the documents he told the state of Tennessee was stolen was not in fact stolen. He also admitted that the date of the theft given in that statement was erroneous. (TX, p. 360-361).

The heart of the matter is that the Court, considering all the evidence, can not say what documents Complainant stole or when. Employer declined to tell Complainant of their allegations in detail, and there is no corroborating evidence to support any of the Employers various accounts of this theft. The preponderance of the evidence, the Court finds, does not support a conclusion that Filer was legitimately terminated for the theft of company documents. As that is the only reason given for Filer's termination[7], we find that said termination was pretextual and actually resulted from Complainant's protected activity.

Damages

1. Reinstatement

The primary remedy under the Act is reinstatement. The Secretary must order reinstatement upon finding reasonable cause to believe that a violation occurred. The reinstatement order takes effect immediately. *See Spinner v. Yellow Freight Systems, Inc.*, 90-STA-17 (Sec'y May 6, 1992).

Here the Court finds that the Complainant was terminated because of his protected activity. This is a violation of the Act. We have explained the reasonable cause for finding this violation herein and therefore recommend ordering reinstatement.

2. Back Pay

An award of back pay under the Act is not a matter of discretion but is mandated once it is determined that the employer has violated the Act. *See Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992); *see also, Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec'y Aug. 21, 1986). Further, back pay awards are to be calculated in accordance with the make whole remedial scheme in § 706 of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.*; *see Loeffler v. Frank*, 489 U.S. 549 (1988).

Filer's discharge was effective on August 24, 1998. Filer did not work as a truck driver during the period between his termination and this hearing. He testified that although he had attempted to find work, no positions in trucking were available. He also testified and we have found that he therefore retrained

[7]Employer of course presents evidence of Complainant's various other sins and reprimands. The Court notes however, that the only stated reason why Mr. Ellis fired Mr. Filer was for taking company documents. (TX, p. 340; CX-15). Our determination, therefore is limited to whether employer could legitimately fire Complainant for this offense.

himself to be an insurance salesman. (TX, p. 121-123).

Respondent bears the burden of proving that Complainant failed to mitigate his damages. *See Lansdale v. Intermodal Cartage Co., Ltd.*, 94-STA-22, 26 (Sec'y July 26, 1995). To meet this burden, a respondent must establish that comparable jobs were available during the interim period and that complainant failed to make reasonable efforts to find new employment that was substantially equivalent to his former position and suitable to a person of his background and experience. *See id.* A complainant will be found to have breached his duty to mitigate only upon a determination that he

showed a willful disregard for his own financial interest. *See Id.* at 27. Additionally, *Polwesky v. B & L Lines, Inc.*, 90-STA-21 (Sec'y May 29, 1991), set forth that the complainant does breach his obligation to mitigate by declining a job that is not substantially equivalent to his or her former position.

The Court finds that Respondent, Arch, has failed to meet its burden in this case. Respondent makes no specific showing of jobs that were available to the Complainant during this interim period. Not a shred of evidence of alternative openings is presented. Complainant, for his part, testified that he applied to jobs at various other trucking and delivery companies but was turned down for all of them. Additionally, Complainant's testimony and evidence indicate that he has done his best to look out for his financial interest by seeking retraining for future employment in another field. There is a difference between the failure to mitigate damages and the failure to mitigate them to the employer's satisfaction. The Court finds that this case is of the second variety and holds that the Mr. Filer did act sufficiently to mitigate his particular damages.

The period for which Filer should receive back pay is as yet indeterminate. The Court believes that additional evidence and briefing may be beneficial to our ultimate resolution of this case. Therefore, the Court finds that Filer is entitled to back pay from August 24, 1998 until the date of the hearing in this case. Herein we will order both parties to brief the Court and provide additional evidence on the Complainant's entitlement to back pay past that date.

The Board has previously held that back pay calculations must be reasonable and supported by the evidence of record, but need not be rendered with unrealistic exactitude. *See Cook v. Garden Lubricants, Inc.*, 95-STA-43 (ARB May 30, 1997) (slip op. at 11-12 n. 12). The Secretary noted that back pay awards are, at best, approximate and any "uncertainties in determining what an employee would have earned but for the discriminations should be resolved against the discriminating employer." *Pettway v. American Cast Iron Pipe Co., Inc.*, 494 F.2d 211, 260-261 (5th Cir. 1974).

Complainant in this case testified that prior to termination he was being paid $11.00 per hour. He also testified that prior to termination he was working an average of 44 to 45 hours per week and was therefore earning about $500.00 per week. (TX, p. 124). Employer presents no evidence to counter this

assertion. The Court therefore finds that the Complainant would have earned $482.50 per week base on an $11.00 per hour wage rate and 45 hours per week. Complainant argues in their brief that between termination and hearing the Complainant lost 33.85 weeks of work. Respondent does not contest this number and we therefore find that the Complainant should be paid for that period at the above rate. Again, we will order herein that both parties provide additional evidence and briefs for the period after the hearing.

Complainant is entitled to $16,332.63 in back pay. Any funds that Complainant received in unemployment compensation from the state of Tennessee is not to be deducted from this award of back pay. *See Moravec v. HC & M Transportation, Inc.*, 90-STA-44 (Sec'y Jan. 6, 1992).

3. Interest

Once the entitlement to back pay under the Act is determined, it is error for the Court to deny interest on the back pay. Interest should be added to compensate the Complainant for loss suffered because his employer unlawfully deprived him of the use of his money. *Hufstetler v. Roadway Express, Inc.*, 85-STA-8 (Sec'y Aug. 21, 1986), *aff'd sub nom., Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). Such interest is to be computed in accordance with the statute for determining interest to be charged on underpayment of Federal taxes, 26 U.S.C. §6621. *Phillips v. MJB Containers*, 92-STA-22 (Sec'y Oct. 6, 1992).

4. Other Benefits

In addition to back pay, Complainant is entitled to those other benefits which were lost because of his termination. In this case, Complainant testified that he also lost his health care insurance at the time he was terminated and that this caused his son to have to forego a scheduled and necessary surgery. Complainant testified that securing replacement coverage would have cost $460 per month. The Court finds that the Complainant is entitled to reinstatement of his medical insurance and any other benefits lost as a result of his termination. Complainant is also entitled to compensation for the eight months of medical insurance coverage he lost at a rate of $460.00 per month. Thus Complainant is entitled to total back insurance benefits of $3,680.00.

ORDER

1. Respondent shall immediately reinstate Complainant;

2. It is recommended that Respondent pay Complainant back wages from August 24, 1998 until the date Complainant is reinstated in the amount of $16,332.63. Back wages shall be paid at the rate of $482.50 per week. Respondent shall assign Complainant retroactive fringe benefits status to the extent that it would affect his current or future entitlement to benefits. Respondent shall also pay to Complainant $3,3680.00 in compensation for lost medical insurance benefits. Prejudgment interest shall be calculated

pursuant to 26 U.S.C. §6621 and shall be paid to Complainant;

3. Respondent shall immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination;

4. Complainant shall have 30 days after the filing of this recommended decision and order to submit additional briefs respecting damages between the date of hearing and the present. Thereafter, Respondent shall have 20 days to submit additional briefs responding to that claim. Upon consideration of those briefs the Court will determine if there is need for an amended decision and order;

5. Complainant's counsel shall file a fee petition within 20 days of receipt of this decision. Respondent shall file any objections to the fee petition within 20 days.

So ORDERED.

A
RICHARD D. MILLS
Administrative Law Judge

NOTICE: This Recommended Decision and/or Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. See 29 C.F.R. §1978.109(a); 61 Fed. Reg. 19978 (1996).